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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-149

SAMUEL G. ALLEN, II,

Petitioner,

v.

BANKERS TRUST COMPANY and BUDINGTON, ST. JOHN & PARK,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

Brief For Respondent Bankers Trust Company In Opposition

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August 26, 1971

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QUESTIONS PRESENTED.

1. Must petitioner's action seeking treble damages for violation of the Sherman and Clayton Antitrust Acts be dismissed for failure to allege or show that respondents' claimed conduct had an adverse affect upon interstate commerce?

2. Does petitioner's failure to raise constitutional questions in proceedings before the District Court and the Second Circuit Court of Appeals preclude consideration of those questions in this Court?

STATEMENT OF THE CASE.

A: The Course of Proceedings

Petitioner commenced this action on April 2, 1970, in the United States District Court for the District of Connecticut, seeking treble damages for alleged violations of the Sherman and Clayton Antitrust Acts, 15 U.S.C. §§1, 15. On June 1, 1970, petitioner filed an amended complaint. Respondent, Bankers Trust Company, answered the amended complaint and moved for summary judgment, contending, **inter alia,** that the amended complaint failed to state a claim upon which reilef can be granted; and that petitioner is collaterally estopped from maintaining this action by virtue of a certain order and decision of the Probate Court for the District of Greenwich, Connecticut, rendered December 15, 1965.

On September 23, 1970, the District Court, having heard the parties, filed its memorandum of decision granting respondent Bankers Trust Company's motion for summary judgment. (Exhibit A to the petition). Judgment entered on September 24, 1970, in accordance with said memorandum of decision, dismissing the action on the merits (Exhibit B to the petition).

Petitioner appealed said judgment to the United

States Court of Appeals for the Second Circuit where the judgment of the District Court was affirmed from the bench without written opinion on May 3, 1971. Petitioner's application for Rehearing En Banc was denied on June 1, 1971.

B: Facts

Petitioner's father, Bertram S. Allen, died a resident of Greenwich, Connecticut on August 24, 1961, leaving an estate inventoried at $1,146,751.64. The Last Will and Testament of Bertram S. Allen was admitted to probate in the Probate Court for the District of Greenwich on September 13, 1961.

Petitioner's mother, Carolyn H. Allen, respondent Bankers Trust Company and petitioner were appointed executors of said will and thereafter served in that capacity during all proceedings with respect to the Allen estate.

At the request of petitioner and Carolyn H. Allen, respondent Bankers Trust Company retained the respondent Budington, St. John and Park as attorneys for the executors of the Bertram S. Allen estate.

On June 24, 1965 the final accounting with respect to the Bertram S. Allen estate was filed in the Probate Court for the District of Greenwich by the respondent Bankers Trust Company. Schedule C of the final account entitled "Statement Showing All Funeral And Administration Expenses and Estate Taxes Paid From Principal" includes fees and disbursements of Orson L. St. John of the respondent Bud-

ington, St. John and Park for legal services and disbursements of $18,217.30.

A hearing on the allowance of the final account was held at the Probate Court for the District of Greenwich on September 9, 1965 before Judge L. Paul Burke.

Petitioner and Carolyn H. Allen appeared with counsel at the aforesaid hearing on the allowance of the final account and opposed the allowance of the aforementioned attorneys' fees of the respondent Budington, St. John and Park.

The Probate Court, having heard the evidence on the reasonableness of the attorneys' fees, the matter was fully submitted on briefs.

On December 15, 1965 the Probate Court entered an order allowing the aforesaid final account. In its memorandum of decision the Probate Court stated that:

> "This Court on the basis of the nature and size of the estate and customary fees in similar matters is of the opinion that the attorneys' fees and the appraisers' fees as set forth in said account are reasonable in amount, and since no other items of the account were objected to, that the account, as filed, should be allowed and an order will be entered accordingly."

Petitioner did not appeal the aforesaid order of the Probate Court to the Superior Court of Connecticut as he had a right to do pursuant to Connecticut

General Statutes §45-289, and the aforesaid order became final on January 15, 1966.

On April 2, 1970, petitioner commenced this action by filing a complaint charging that the respondents agreed, combined and conspired in violation of the Sherman and Clayton Antitrust Acts "to secure for Budington, St. John and Park an attorney's fee in excess of the reasonable value of its services rendered in the administration of the estate of Bertram S. Allen."

ARGUMENT.

I.

Petitioner Failed to Allege and Cannot Prove that the Complained of Conduct of the Defendants Affected Interstate Commerce.

Petitioner contends that the New York bank, as co-executor, and the Connecticut law firm, as attorneys for the estate, conspired to establish and pay excessive fees to the attorneys for services rendered in the estate administration.

The amended complaint and the moving papers fail to allege that the claimed conspiracy restrained interstate commerce, and it is apparent on the face of the record that no such restraint on commerce could have occurred. As the District Court observed, "This is a fatal defect in the plaintiff's case."

In determining what constitutes trade or commerce among the several states within the meaning

of the Sherman Anti-Trust Act the controlling consideration is ". . . the degree of interstate activity involved in the particular business under review." **United States v. International Boxing Club,** 348 U.S. 236, 243 (1954).

The courts have established two criteria for determining whether given activities sufficiently affect interstate commerce to support a civil action founded on the Sherman Act.

> "There are two tests to determine whether interstate commerce is involved. (1) whether the acts complained of occurred within the flow of interstate commerce; or, (2) whether the acts complained of while wholly intrastate, substantially affected interstate commerce." **Sun Valley Disposal Co. v. Silver State Disposal Co.,** 420 F.2d 341, 343 (9th Cir. 1969)

Petitioner concedes that he cannot establish wrongdoing which substantially affected interstate commerce (Plaintiff's Brief in the Second Circuit Court of Appeals, p. 6). Accordingly, petitioner relies entirely upon his abiilty to prove that the acts complained of occurred "within the flow of interstate commerce." (Plaintiff's Brief in the Second Circuit Court of Appeals p. 5-6) In support of the latter proposition, petitioner offers to prove that the administration of a Connecticut estate by a New York executor, represented by a Connecticut law firm "necessarily involves communication and the transmission of information" in interstate commerce (Plaintiff's Brief in the Second Circuit Court of Appeals, p. 8). Such allegation, if made and proved, is entirely insufficient to establish that the alleged con-

spiracy affected interstate commerce. The administration of a decedent estate in a Connecticut probate court is an intrastate matter. The fact that an executor is a New York bank and that the executor bank communicates with and transmits information to Connecticut attorneys for the estate, is incidental to the flow of interstate commerce and insufficient to convert a local activity into an interstate business. **Sun Valley Disposal Co. v. Silver State Disposal Co., (supra); Lieberthal v. North Country Lanes, Inc.,** 332 F.2d 269, 272 (2d Cir. 1964); **Bookout v. Schine Chain Theatres, Inc.,** 253 F.2d 292, 295 (2d Cir. 1958); **Stewart v. Hevelone,** 283 F.Supp. 842, 846 (D.Neb. 1968); **L. S. Good & Co. v. H. Daroff & Sons, Inc.,** 279 F.Supp. 925, 927 (N.D.W.Va. 1968).

Applying the above principle the District Court held that:

> "Even assuming the truth of the allegation that the out-of-state executor and the in-state attorney for the estate agreed and conspired to charge excessive fees, any possible effect on interstate commerce is too remote and inconsequential to satisfy the requirements of the Sherman Act."

II.

Petitioner's Failure to Urge or Brief in the Lower Courts Alleged Violations of his Constitutional Rights Precludes Consideration of Such Alleged Violations in This Court.

Petitioner asserts that the lower courts "effectively

abrogated" his right to trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States (Petition p. 8). This contention is raised for the first time in the petition for certiorari. It was not raised or briefed in the District Court or in the Second Circuit Court of Appeals. Accordingly, it cannot be considered by this Court. **Tyrrell v. District of Columbia,** 243 U.S. 1 (1917); **California v. Taylor,** 353 U.S. 553, 557 n.2 (1957); **Lawn v. U.S.,** 355 U.S. 339, 362 n.16 (1958)

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO THE BRIEF FOR RESPONDENT BANKERS TRUST COMPANY OPPOSING THE GRANTING OF THE WRIT

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